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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 SAN FRANCISCO DIVISION

12 MARK HAINES,

13 Plaintiff,

14 v.

15 DARYL B. BRAND and others,

16 Defendants.

Case No. 11-cv-01335 YGR

**REPORT AND RECOMMENDATION TO  
GRANT DEFENDANTS' REQUEST FOR  
HAINES' MEDICAL RECORDS AND TO  
DENY HAINES' REQUEST FOR  
APPEARING TELEPHONICALLY AT HIS  
DEPOSITION**

Re: Dkt. Nos. 66, 67

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18 The parties filed separate discovery letter briefs in which they present two discovery  
19 disputes. The first dispute concerns defendants' request for the release of Haines' medical  
20 records from a health care provider named Alta Bates Medical Center. The second dispute  
21 concerns Haines' request to be deposed telephonically. Both disputes were referred to this Court  
22 by District Judge Gonzalez Rogers for a report and recommendation. Dkt. No. 69. The Court  
23 recommends that District Judge Gonzalez Rogers grant defendants' request for the release of  
24 Haines' medical records, as the records are relevant to the claims and defenses in this action and  
25 any privilege that applies to the records was waived by Haines. The Court further recommends  
26 that District Judge Gonzalez Rogers deny Haines' request to be deposed telephonically, as he has  
27 not established good cause for doing so.

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Case No. 11-cv-01335 YGR  
REPORT AND RECOMMENDATION

## I. BACKGROUND

### A. Summary of Haines' claims against defendants

Haines, who is appearing pro se, is an "unemployed transient who routinely travels and sleeps in his car." Second Am. Compl. ¶ 11, Dkt. No. 56. Defendants Daryl B. Brand, David Wee, Harvey S. Tureck, and Fred Madrano are current or former employees of the City of Berkeley, which operates the Berkeley Free Clinic (BFC) and also is a defendant in this case. *Id.* ¶¶ 6-10.

Haines claims that when he went to the BFC to seek information and emotional support on December 4, 2009, defendants allegedly detained him for twelve hours under California's Welfare and Institutions Code § 5150 without having probable cause to do so. *Id.* ¶¶ 11-90. Haines further claims that during his detention, defendants drew blood from him, physically restrained him, and conducted medical and psychiatric evaluations of him without his consent. *Id.* ¶¶ 124-184.

Haines brings five claims against defendants in his second amended complaint: (1) count one is for violations of 42 U.S.C. § 1983; (2) count two is for violations of the Due Process Clause of the Fourteenth Amendment; (3) count three is for violations of the Equal Protection Clause of the Fourteenth Amendment; (4) count four is for false imprisonment in violation of California law; and (5) count five is for intentional infliction of emotional distress in violation of California law.

Defendants' motion to dismiss Haines' second amended complaint is scheduled for a hearing before District Judge Gonzalez Rogers on June 19, 2012. Dkt. Nos. 57, 59.

### B. The discovery disputes at issue

#### 1. Haines' medical records

Defendants claim to have given notice to Haines and District Judge Chen, who was previously assigned to this action, of their intent to obtain Haines' medical records from each of the medical service providers mentioned in the operative complaint. Dkt. No. 66 at 1. Defendants sent proposed medical releases to Haines, but Haines refused to sign any of them even though defendants narrowed the scope of the releases at Haines' request. *Id.*

1 Defendants issued a subpoena to Alta Bates Medical Center calling for Haines' medical  
2 records from December 4 and 5, 2009. *Id.* at 1-2. The medical records requested in the  
3 subpoena include "all health, medical and/or mental health records, including all electronically  
4 stored information, related to any service and/or treatment of Mark Haines on or around  
5 December 4, 2009 and/or December 5, 2009." Dkt. No. 66, Ex. A at 4. The subpoena also  
6 requests "all billing records reflecting services provided to Mark Haines on December 4 and 5,  
7 2009." *Id.* Alta Bates refused to produce Haines' medical records in accordance with the  
8 subpoena because it requires a medical release signed by Haines as a condition to releasing  
9 Haines' medical records. *Id.* at 2.

10 Defendants seek an order compelling Alta Bates to release Haines' medical records in  
11 accordance with the subpoena. Dkt. No. 66 at 3. Defendants argue that the records are relevant  
12 to the claims in the operative complaint because such claims are based in part on Haines'  
13 involuntary detention and evaluation at Alta Bates. *Id.* at 2. Defendants further argue that the  
14 records are relevant to their defenses against Haines' claims, because the records contain  
15 information with respect to Haines' demeanor, conduct, and possible intoxication at the time of  
16 his involuntary detention. *Id.* Defendants also contend that Haines has waived privilege as to the  
17 records because he put his detention and treatment at Alta Bates at issue in the operative  
18 complaint. *Id.* at 3. Defendants add that Haines never signed a proposed protective order they  
19 sent to Haines. *Id.*

20 Haines opposes the release of his medical records, arguing that any medical records  
21 created after he was involuntarily detained are irrelevant to his claims against defendants, as these  
22 records do not show whether defendants had probable cause to detain him under California's  
23 Welfare and Institutions Code § 5150. Dkt. No. 67 at 1. Haines further argues that defendants'  
24 subpoena is abusive based on Supreme Court precedent and the discovery rules, as his records are  
25 privileged and confidential. *Id.* at 2. Haines claims that he sent a proposed protective order to  
26 defendants but that they "made no response." *Id.* at 6. Haines requests that the District Court  
27 enter a standard protective order that classifies any released medical records as confidential. *Id.*

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2. Haines' deposition

Defendants noticed Haines' deposition for May 15, 2012, at 10:00 a.m., at the Berkeley Civic Center. Dkt. No. 66 at 4. Defendants noticed the deposition to be recorded stenographically and by video. *Id.*

Haines requests that his deposition be taken telephonically rather than by videotape. Dkt. No. 67 at 6. He argues that "he has serious privacy concerns about the taking of his deposition" and that "records created or sought to be created by the unlimited taking [of his] deposition testimony are likewise only potentially relevant to the claims Defendants seek to have dismissed." *Id.* at 1, 6.

Defendants oppose the request, arguing that the timing and scope of Haines' deposition as stated in the deposition notice does not exceed the provisions of the discovery rules. Dkt. No. 66 at 4. Defendants further contend that Haines has provided no grounds for conducting his deposition telephonically. Defendants note that Haines lives in his car in Berkeley and has not expressed any difficulty in traveling to the Berkeley Civic Center for his deposition. *Id.* Defendants also note that Haines' lack of representation and housing situation "make a telephonic deposition unworkable." *Id.*

3. Judge Chen's order concerning Haines' deposition and medical records

Before this action was reassigned to District Judge Gonzalez Rogers, District Judge Chen held an initial case management conference. CMC Minutes, Dkt. No. 49. During the conference, Judge Chen allowed defendants take Haines' deposition and ordered the parties to agree on a stipulated protective order that would govern the production of Haines' medical records. *See id.* ("Defendants may take plaintiff's deposition. Parties shall meet and confer to agree on a stipulated protective order regarding production of plaintiff's medical records.").

## II. DISCUSSION

### A. **Haines' medical records should be produced by Alta Bates Medical Center**

1. The medical records at issue are relevant the claims and defenses in this action

A party may obtain discovery regarding any nonprivileged matter that is relevant to a party's claim or defense. FED. R. CIV. P. 26(b)(1). "Relevant information need not be admissible

1 at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible  
2 evidence.” *Id.*

3 Here, Haines’s medical records fall within the scope of discoverable information under  
4 Rule 26, because the records are relevant to each of the claims that Haines brings against  
5 defendants. Each of the claims in the operative complaint is based on defendants’ allegedly  
6 wrongful detention, treatment, and evaluation of Haines. Second Am. Comp. ¶¶ 165-210. Haines  
7 claims that defendants lacked probable cause to detain, treat, or evaluate him based on  
8 California’s Welfare and Institutions Code § 5150, which allows certain persons “upon probable  
9 cause” to detain, treat, and evaluate for seventy-two hours any person believed to be a danger to  
10 himself as a result of a mental disorder. CAL. WELF. & INST. CODE § 5150. Whether defendants’  
11 detention, treatment, or evaluation of Haines was unlawful depends on whether defendants  
12 actually had probable cause to believe that Haines was a danger to himself as a result of a mental  
13 disorder. The medical records requested by defendants are reasonably calculated to lead to the  
14 discovery of admissible evidence on this issue.

15 2. Haines waived any privilege applicable to the medical records at issue

16 When a plaintiff puts his medical records at issue by bringing claims against his medical  
17 services providers based on allegations of unlawful involuntary detention in violation of  
18 California’s Welfare and Institutions Code § 5150, the plaintiff waives privilege to any medical  
19 records that are relevant to his claims against the providers. *See, e.g., Rhodes v. County of*  
20 *Placer*, 09-cv-00489, 2011 WL 130160, at \*5 (E.D. Cal. Jan. 14, 2011) (holding that the plaintiff  
21 waived privilege to her medical records by bringing claims against her medical service providers  
22 based on alleged violations of § 5150, as the plaintiff’s complaint relies the plaintiffs’ privileged  
23 communications with the providers).

24 Here, Haines put his medical records at issue by bringing claims against defendants based  
25 on defendants’ detention, treatment, and evaluation of Haines under § 5150. Consequently,  
26 Haines has waived any privilege with respect to any medical records that are relevant to these  
27 claims.

28 The Court finds that the scope of the medical records that defendants seek to obtain from

1 Alta Bates is appropriate, as defendants seek records generated on December 4 and 5, 2009,  
2 which are the dates during which Haines claims to have been detained by defendants.  
3 Accordingly, this Court recommends that District Judge Gonzalez Rogers enter an order  
4 compelling Alta Bates to release Haines' medical records in accordance with the subpoena  
5 defendants served on Alta Bates. *See* CAL. CIV. CODE § 56.10(b)(1) (noting that a health care  
6 provider may disclose a patient's medical information if it is compelled to do so by court order).

7 **B. Haines has not shown good cause for conducting his deposition telephonically**

8 A party noticing the deposition of another party may set the place of the deposition. FED.  
9 R. CIV. P. 30(b)(1). A party noticing the deposition of another party also may set the method for  
10 recording the testimony. FED. R. CIV. P. 30(b)(3)(A). "Unless the court orders otherwise,  
11 testimony may be recorded by audio, audiovisual, or stenographic means." *Id.*

12 Here, Haines has not established grounds for conducting his deposition telephonically, as  
13 he presents no facts showing that attending his deposition in person would cause him hardship of  
14 any sort. Indeed, Haines lives in Berkeley, which is where the deposition is scheduled to take  
15 place. Haines' reluctance to be deposed in person appears to be based on defendants' intent to  
16 record his testimony by video. *See* Dkt. No. 67 at 1 (noting that Haines "has serious privacy  
17 concerns about the taking of his deposition noticed for May 15, 2012"); *id.* at 7 (requesting that  
18 his deposition "be taken by telephone rather than videotape"). Because this case is based on  
19 claims arising out of an involuntary detention under § 5150, the Court finds that good cause exists  
20 for allowing defendants to record Haines' deposition by video. Accordingly, the Court  
21 recommends that District Judge Gonzalez Rogers require Haines to attend his deposition in  
22 person and order that the deposition be recorded by video and stenographically.

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### III. CONCLUSION


Because Haines' medical records are relevant to the claims and defenses in this action, and because Haines waived any privilege to the records by putting them at issue in the operative complaint, the Court recommends that District Judge Gonzalez Rogers issue an order compelling Alta Bates Medical Center to release Haines' medical records in accordance with the subpoena defendants issued to Alta Bates. *See* Subpoena, Dkt. No. 66, Ex. A at 4 (requesting "all health, medical and/or mental health records, including all electronically stored information, related to any service and/or treatment of Mark Haines on or around December 4, 2009 and/or December 5, 2009," and "all billing records reflecting services provided to Mark Haines on December 4 and 5, 2009"). The Court also recommends that District Judge Gonzalez Rogers require the parties to file in ECF a stipulated protective order that incorporates Haines' proposals with respect to the use of his medical records in this litigation. *See* Proposed Modifications to Protective Order, Nos. 1-4, Dkt. No. 67 at 6.

The Court further recommends that District Judge Gonzalez Rogers order Haines to appear in person at his deposition and order that Haines' deposition be recorded by video and stenographically.

The parties may file objections to this report and recommendation within fourteen days of the date this order is filed. *See* FED. R. CIV. P. 72(b).

IT IS SO ORDERED.

Date: May 13, 2012

  
Nathanael M. Cousins  
United States Magistrate Judge